No. 49760-3-II

THE COURT OF APPEALS FOR THE STATE OF WASHINGTON
DIVISION II

STATE OF WASHINGTON,

Respondent,

vs.

BRIAN KEITH BRUSH,

Appellant.

Appeal from the Superior Court of Washington for Pacific County

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Respondent's Brief

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Washington Cases

Federal Cases

Statutes

Rules

Other Sources

STATE'S RESPONSE TO APPELLANT'S ISSUES AND ASSIGNMENTS OF ERROR

1. The trial court did not impermissibly enhance Mr. Brush's sentence as the statute is not overbroad.

2. RCW 9.94A.535(3)(h)(i) is not facially overbroad.

3. Mr. Brush was not denied due process.

4. The Statute is not vague.

5. The "psychological abuse" aggravating factor does not fail to provide fair notice.

6. The "psychological abuse" aggravating factor provides sufficient standards to prevent arbitrary enforcement.

7. The "psychological abuse" aggravator does not violate due process.

8. The "psychological abuse" aggravating factor is not facially invalid and unconstitutional as applied.

9. The trial court did not improperly rely on Mr. Brush's determination to change locks on the family home as proof of "psychological abuse."

10. Mr. Brush's 1060-month sentence is not clearly excessive.

11. The trial court did not error by imposing a sentence of 1060 months.

12. If the State prevails on appeal, the Court of Appeals should award costs.

STATEMENT OF THE CASE

On September 11, 2009, three police officers were on foot patrol in the City of Long Beach, Washington, when they heard gun fire. As they looked up they observed Brian Brush fire a shotgun four times into the body of his former fiancé, Lisa Bonney, thereby causing her death. RP (11/28/11) 76-83, 89-91, 98-103, 107-113. The officers saw Brush and heard one shot, followed by a pause, and then additional shots in succession. RP (11/28/11) 98. They saw Brush reload the shotgun in an angry manner," violently chambering the next round" like he "was just trying to tear the shotgun apart to get another round chambered." RP (11/28/11) 83, 98, 116. Brush's first shot was from three feet away, shooting Bonney in the abdomen; the remaining shots were within three to nine feet. RP (11/28/11) 114, (11/29/11) 71. Inside of Brush's pickup truck officers found a set of handcuffs looped and fastened through a seatbelt in the front seat; the handcuff key and handcuff case were located at Brush's home. RP (11/28/11) 175-177, 183-185.

Two tourists were having lunch with their family when they observed Brush and Bonney having a discussion. Bonney was not acting aggressively towards Brush. RP (11/28/11) 127, 133. Bonney attempted to leave and pulled out of Brush's grasp when he then

went to the back passenger compartment of his pickup truck, retrieved his shotgun, and shot Bonney four times. RP (11/28/11) 121-123, 134- 136.

Shortly after Brush was incarcerated in the Pacific County Jail he made a telephone call to his ex-wife. During this recorded conversation Brush admitted to killing Bonney. RP (11/29/11) 21-24.

At the initial trial, Dr. Nelson testified that he had conducted the post-mortem examination of Bonney. RP (11/30/11) 14-16. Dr. Nelson has been a forensic pathologist since 1992 and began his career in Atlanta, Georgia in 1993. He is presently a Deputy State Medical Examiner for Oregon and a forensic pathologist for Pacific, Wahkiakum, Cowlitz, Skamania, Klickitat and Clark counties. Dr. Nelson also serves as a crime scene analyst in criminal death investigations. RP (11/30/11) 11-14. Dr. Nelson testified Bonney was shot four times. According to Dr. Nelson, the first shotgun wound, across the abdomen, would not have killed Bonney, but it would have been extremely painful. It was inflicted at a range of four to five feet. RP (11/30/11) 21-24, 44. The second shot was to Bonney's back and was the result of a shotgun held from the waist and was a direct shot. This wound penetrated the muscles in the back, broke the lower lumbar and upper cervical vertebrate bodies,

basically blowing apart the lower part of her spine, lacerating the mesentery, and shredding her aorta and small and large bowel. This shot also shredded the inferior vena cava and perforated the duodenum. According to Dr. Nelson, this shot was fired within three and a half feet from Ms. Bonney, was fatal, and occurred at such a close range as to imbed the shot cup (wadding which separates the pellets from the shotgun from the gun powder in a shotgun shell) inside of Bonney. RP (11/30/11) 26-27, 32, 34. The next shot that Brush fired entered Bonney's buttocks and, alone, would have been sufficient to cause Bonney's death. RP (11/30/11) 37. Brush's final shot destroyed Bonney's head. This shot was fired at close range (within three and one-half feet); and the bursting-rupture wound created a fracture and exploded the bones of the skull. This final shot was so intense that the brain and other tissue was evacuated out of Bonney's head. RP (11/30/11) 39- 42. Dr. Nelson has investigated hundreds of homicide matters over his 19 years as a forensic and crime scene analyst, and described this homicide as one of the two worst he has observed in terms of being gratuitously violent and causing damage far in excess of the level of violence necessary to kill someone. RP (11/30/11) 46-50.

The events which transpired on September 11, 2009 were part of an ongoing pattern of domestic violence.

Brush and Bonney had a dating relationship for almost two years and they had lived together for much of this time. RP (11/29/11) 126, (11/30/11) 47-59, (12/6/11) 176. Bonney and Brush, along with Bonney's daughter, Elizabeth, [1] lived in Roseburg, Oregon. In June, 2008, following an argument, Brush kicked Bonney and her daughter out of their home and changed the locks. RP 192. A year later, on July 25, 2009, Bonney and Brush had an argument while at their Long Beach, Washington home. Brush became violent and bashed a chair over a couch and broke a bottle of wine on a counter before going into the garage where Bonney locked the door behind him. As a result, Brush took a hammer and struck Bonney's BMW several times with the hammer causing damage to the hood and top of her vehicle. PR (12/5/11) 52-53, 134-35, RP 108-111. Despite the fact that Brush had used a hammer and hit the hood and top of Bonney's BMW, as well as taken her property and thrown it out of their house and breaking her camera, she was arrested based on Brush's assertion that Bonney had scratched him. RP 111-112,

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[1] Elizabeth Bonney's first name is being used to avoid confusion. No disrespect is intended.

194-195. The following day Brush went to the Long Beach Police Department to report he had made up the assault and that it never occurred. RP 113. Bonney moved out of Brush's home and into a rental home she owned on Boulevard along with Elizabeth. RP 196.

Following the false allegation of assault, Brush and Bonney engaged in counseling (separately) and agreed to a self-imposed no-contact agreement, but Brush repeatedly violated the agreement. RP (12/5/11) 140-141. Over the course of the next two months, Brush pursued the relationship with Bonney in an obsessive way. According to the expert who testified for the Defense, Brush was pathological about the relationship. He sent Bonney threatening emails and repeatedly harassed her. RP (12/5/11) 55, 138, 159.

On August 12, 2009 Dan Driscoll was talking with Bonney at a local restaurant when Brush drove by. RP 158. Bonney became terrified and immediately wanted to leave. *Id.* Bonney had even switched cars because Brush was following her and she wanted to throw Brush off. RP 162. Bonney was certain she was being stalked by Brush. RP 167.

Brush's counselor was Rich Hedlund and on August 13, 2009 they meet with Bonney and her counselor, Susie Goldsmith. RP 227-

228. During this counseling session Brush became angry and threatened Bonney with financial ruin. RP 229.

On August 17, 2009 Brush stalked Bonney at a concert, and then followed her to a friend's house. RP 233. There, Brush confronted Bonney at Bonney's long-term friend, Dan Driscoll's, parents' home by banging on the windows and doors until Bonney eventually came out to talk with Brush. RP (12/5/11) 138-139, RP 161-167. While at Driscoll's parents' home, Brush sent text messages to Elizabeth about her mother. RP 198. Brush said, "I know what your mom's doing. She's cheating on me. Let me take you to the house. I can prove to you. I can show you the house so you can see for yourself." RP 199. Brush had never been to Driscoll's parents' home. RP 167. During a counseling session with Rich Hedlund, Brush admitted to following Bonney to Driscoll's residence and observing her park her car in his garage. RP 233-234. Brush looked into the window of the garage and observed her car. RP 234. Brush said as a result of this he then went to the police department to file what would be a second false assault claim against Bonney. RP 235.

Bonney left Driscoll's parents' home and immediately text messaged Elizabeth, saying Brush was stalking her and he just

showed up (referring to the Driscoll residence). RP 200. Bonney met Elizabeth at their home, drove into the garage and said "we cannot stay here" and they ran to a friend's apartment. RP 200-201. Bonney was frantic, and ran to her friend's apartment, but was afraid to call the police. 204-205. Bonney and Elizabeth remained at Cindy's for several hours before finally calming down enough to leave. RP 208.

When Elizabeth and Bonney left they took several precautions to ensure Brush wasn't keeping them under surveillance. RP 210. Unfortunately as they made their way away from their house, within about 30 seconds, Brush appeared driving his truck. RP 211. There was no sidewalk in the area and he accelerated towards them and it was unclear to them whether he was going to hit them or stop to yell at them so Bonney told her daughter to run. RP 212-215, RP (12/6/11) 179. The pair ran two blocks and hid. RP (12/6/11) 189, RP 216. Bonney was shaking, crying, and throwing up as a result of the fear that she experienced. RP (12/6/11) 190. After they felt Brush was gone they ran to the beach because he could not drive there. RP 217. When they arrived home Brush had called and left messages on Bonney's phone saying "If you don't answer I'm sure that your work would love to see naked pictures posted on the front door. Like I'm sure these people would love to see it if you're not

going to talk to me. I'm going to turn you in for collecting unemployment for Oregon, we're going to turn you into the tax people." RP 218-219, RP (12/6/11) 191.

The following day, on August 18, 2009, Brush went to another counseling session with Dr. Hedlund where Brush again said he would going to cause problems for Lisa by reporting she had stolen his police-issued firearm. RP 235.

Steven Berglund testified that Brush stalking Bonney on August 31, 2009 by sitting a few blocks away from her home and keeping her under surveillance as he helped move items into Bonney's new home. Berglund testified Brush was again observed stalking Bonney on September 4, 2009, 7 days before Brush murdered Bonney, following her as she drove through town. RP 130-136, 147. Bonney's demeanor and fright having Brush following her was obvious and she was very scared. RP 136-137.

Brush's counselor, Dr. Hedlund, admitted as an expert in this case, characterized Brush's actions as an ongoing pattern of domestic violence. RP 246, 248.

The trial court found Brush and Bonney were in a domestic relationship from April, 2008 through September 11, 2009 and that there was an ongoing pattern of abuse which included psychological

abuse, physical destructions of Bonney's property, threats of harm, and stalking. RP 282. The trial court imposed a 1060 month sentencing, finding a substantial and compelling reasons to impose an exceptional sentence, specifically indicating Brush's conduct warranted no sympathy from the court and that he should spend the rest of his life knowing that he will never get out of prison. RP 296.

Brush timely appealed.

ARGUMENT

I. THE "PSYCHOLOGICAL ABUSE" AGGRAVATING FACTOR IS NOT VAGUE OR OVERBROAD.

A. Standard of review.

The interpretation of a statute and the determination of whether a statute violates the United States Constitution are issues of law that are reviewed *de novo*. *State v. Clinkenbeard*, 130 Wn.App. 552, 123 P.3d 972 (2005). Where the constitutionality of a statute is challenged, the statute is presumed constitutional and the burden is on the party challenging the statute to prove its unconstitutionality beyond a reasonable doubt. *Tunstall v. Bergeson*, 141 Wn.2d 201, 220, 5 P.3d 691 (2000); *State v. Hunley*, 175 Wn.2d 901, 287 P.3d 584 (2012). Courts are generally hesitant to strike a duly enacted statute unless fully convinced that the statute violated

the constitution. *Id.* If possible, a statute should be construed as constitutional. *State v. Farmer*, 116 Wn.2d 414, 419–20, 805 P.2d 200, (1991).

The party challenging the constitutionality of a statute must establish that there is no reasonable doubt that the statute violates the constitution. *Island County v. State*, 135 Wn.2d 141, 146–47, 955 P.2d 377 (1998). A court's focus when addressing constitutional facial challenges is whether the statute's language violates the constitution, not whether the statute would be unconstitutional "as applied" to the facts of a particular case. *Tunstall*, 141 Wn.2d at 221, citing *JJR Inc. v. City of Seattle*, 126 Wn.2d 1, 3–4, 891 P.2d 720 (1995). "'[A] facial challenge must be rejected unless there exists no set of circumstances in which the statute can constitutionally be applied.'" *Tunstall*, 141 Wn.2d at 211, quoting *In re Detention of Turay,* 139 Wash.2d 379, 417 n. 27, 986 P.2d 790 (1999).

Brush asserts the State bears the burden of justifying the restriction on speech and cites *State v. Immelt*, 173 Wn.2d 1, 267 P.3d 305 (2011). [2] However, even *Immelt* agreed "[t]he party challenging an enactment bears the burden of proving its

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[2] Brief of Appellant at 6

unconstitutionality" *Id.* at 6, quoting *Voters Educ. Comm. v. Pub. Disclosure Comm'n*, 161 Wn.2d 470, 481, 166 P.3d 1174 (2007). Furthermore this statute concerns itself with the conduct and not speech, which is consistent with conduct-driven actions over speech analysis. See *State v. Trey M.*, 186 Wn.2d 884, 383 P.3d 474 (2016).

Without conceding Brush may properly raise this issue for the first time on appeal, the State will address the merits.

B. THE ONGOING PATTERN OF PSYCHOLOGICAL, PHYSICAL, OR SEXUAL ABUSE AGGRAVATOR IS NOT UNCONSTITUTIONALLY OVERBROAD.

Brush contends that the "ongoing pattern of abuse" aggravator is unconstitutionally vague because it uses the term "psychological abuse" and because "it penalizes a substantial amount of protected speech" and is, thus, overbroad.[3] His argument should be rejected for three reasons. First, this statute requires a conviction for underlying criminal conduct and then addresses only the sentence which should be imposed. Second, as a result that this is a sentencing issue, the Supreme Court has held that sentencing aggravators are not subject to a due process vagueness challenge because they do not define conduct or allow for arbitrary arrest and

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[3] Brief of Appellant at 9, 11, 14, 16, 19, 25, 26

criminal punishment by the State. *State v. Baldwin*, 150 Wn.2d 448, 459, 78 P.3d 1005 (2003)[4]; *Beckles v. United States*, 137 S. Ct. 886, 197 L.Ed.2d 145 (2017)(Sentencing Guidelines were not subject to a void for vagueness challenge under Fifth Amendment Due Process Clause).[5] Third, the statute is not unconstitutionally vague. The terms used in defining the sentencing aggravator are ones of common understanding and define conduct.

Under the Due Process Clause, a statute is void for vagueness if: 1) it fails to define the offense with sufficient precision that a person of ordinary intelligence can understand it; or 2) it does

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[4] Brush contends *Baldwin* is no longer good law asserting *Baldwin* addresses an earlier version of the Sentence Reform Act (SRA) and because the SRA does not grant a judge the "same degree of discretion" as it did when *Baldwin* was decided and post-*Blakely*, *Baldwin* no longer applies (Brief of Appellant at 20-21, 24). This is inaccurate and the rational expressed in Baldwin remain: Washington Courts remain free to exercise discretion in fashioning a sentence, especially when an aggravating circumstance is proven. See *State v. Duncalf*, 177 Wn.2d 289, 300 P.3d 352 (2013)(Supreme Court again declaring aggravating factors are not subject to a vagueness challenge); see also the unpublished case of *State v. Schumacher*, 185 Wn.App 1048 (2015) cited pursuant to GR 14.1(a) for its persuasive value.

[5] Brush's reliance on *Johnson v. United States*, -- U.S. --, 135 S. Ct. 2551, 192 L.Ed. 2d 569 (2015), is misplaced as noted in *Beckles v. United States* (citation omitted)

not provide standards sufficiently specific to prevent arbitrary enforcement. *State v. Eckblad*, 152 Wn.2d 515, 518, 98 P.3d 1184 (2004). Both prongs of the vagueness doctrine focus on laws that prohibit or require conduct. *Baldwin*, 150 Wn.2d at 458.

The Washington Supreme Court has held that sentencing aggravators are not subject to vagueness challenges under the Due Process Clause because they "do not define conduct nor do they allow for arbitrary arrest and criminal prosecution by the State." *Baldwin*, 150 Wn.2d at 459. "A citizen reading the guideline statutes will not be forced to guess at the potential consequences that might befall one who engages in prohibited conduct because the guidelines do not set penalties." *Id*. The Court further observed that "[t]he guidelines are intended only to structure discretionary decisions affecting sentences; they do not specify that a particular sentence must be imposed. Since nothing in these guideline statutes requires a certain outcome, the statutes create no constitutionally protectable liberty interest." *Id.* at 461.

The doctrine of *stare decisis* provides that a court must adhere to a prior ruling unless the challenging party can make "a clear showing" that the rule is "incorrect and harmful." *In re Stranger Creek,* 77 Wn.2d 649, 466 P.2d 508 (1970); *see also State v. Kier*,

164 Wn.2d 798, 804, 194 P.3d 212 (2008) (the court does "not lightly set aside precedent, and the burden is on the party seeking to overrule a decision to show that it is both incorrect and harmful."). Because Brush fails to show that the Court's decision in *Baldwin* is incorrect and harmful, this Court must adhere to its holding that exceptional sentence aggravating factors are not subject to a vagueness challenge.

Even if Brush could raise a due process vagueness challenge to the statute, his argument would fail. The terms used in the sentencing aggravator are of common understanding.[6] Under the particular facts of this case, Brush was on notice that his criminal conduct was aggravated when he spent over a year physically and emotionally abusing his former fiancée as their relationship dissolved.

A statute is presumed to be constitutional. *State v. Coria*, 120 Wn.2d 156, 163, 839 P.2d 890 (1992). The party challenging a statute's constitutionality for vagueness bears the burden of proving

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[6] Of note, the Washington State Supreme Court Instruction Committee does not suggest that any further explanatory instruction need be given in regards to the phrase "psychological, physical or sexual abuse." *See* 11A Washington Practice: Washington Pattern Jury Instructions: Criminal 300.17 at 719-21 (3rd ed. 2008).

beyond a reasonable doubt that the statute is unconstitutionally vague. *City of Spokane v. Douglass,* 115 Wn.2d 171, 177, 795 P.2d 693 (1990).

A statute meets constitutional requirements "[i]f persons of ordinary intelligence can understand what the ordinance proscribes." *Douglass*, 115 Wn.2d at 179. It is not enough to hold a statute vague merely because "a person cannot predict with complete certainty the exact point at which his actions would be classified as prohibited conduct." *Haley v. Med. Disciplinary Bd.*, 117 Wn.2d 720, 740, 818 P.2d 1062 (1991) (quoting *Seattle v. Eze*, 111 Wn.2d 22, 27, 759 P.2d 366 (1988)). After all, "[s]ome measure of vagueness is inherent in the use of language." *Id.* Thus, vagueness "is not mere uncertainty." *State v. Watson*, 160 Wn.2d 1, 7, 154 P.3d 909 (2007). The test for vagueness is whether a person of reasonable understanding is required to guess at the meaning of the statute. *State v. Branch*, 129 Wn.2d 635, 648, 919 P.2d 1228 (1996).

Brush equates the language of the aggravator at issue here with certain language contained in the harassment statute that was found unconstitutionally vague in *State v. Williams,* 144 Wn.2d 197, 26 P.3d 890 (2001). A person can commit misdemeanor harassment if the person knowingly threatens "[m]aliciously to do any other act

which is intended to substantially harm the person threatened or another with respect to his or her physical or *mental health or safety*. RCW 9A.46.020(1)(a)(iv) (emphasis added). This provision of the statute was found to be unconstitutionally vague because the phrase "mental health or safety" did not contain a meaningful definition, offered law enforcement no guidance beyond subjective impressions of what constituted a violation, and the average citizen would have no way of knowing what conduct was prohibited by the statute because each person's perceptions of the law may be different. *Williams*, 144 Wn.2d 197. Such is not the case here; a person of "ordinary intelligence" would understand to what the statute pertains.

RCW 9.94A.535(3)(h)(i) provides that the current offense be a domestic violence offense that is "part of an *ongoing pattern of psychological, physical, or sexual abuse* of a victim or multiple victims manifested by multiple incidents over a prolonged period of time." (emphasis added). "Abuse" is defined as "a departure from legal or reasonable use; misuse [or] physical or mental maltreatment, often resulting in mental, emotional, sexual, or physical injury." Black's Law Dictionary 10 (8th ed.2004). "Psychological," is defined as "relating to, characteristic of, directed toward, influencing, arising in, or acting through the mind, esp. in its affected or cognitive

functions." Webster's Third New Int'l Dictionary (1993). Thus, an ordinary person of common intelligence would understand that the statute pertains to mental abuse involving acts that are not legal or reasonable. For example, corporal punishment of a child is not unlawful when such physical discipline is objectively reasonable. *State v. Singleton*, 41 Wn. App. 721, 723-24, 705 P.2d 825 (1985). This is not difficult to understand or apply.

While there may be "some possible areas of disagreement," or the "exact point" of defining a violation not completely evident, that does not make a statute unconstitutionally vague. Rather, Brush must prove beyond a reasonable doubt that a person of ordinary intelligence would be unable to know what the statute proscribes. *Douglass*, at 179. He fails in that burden here and has not demonstrated a basis for imposing any construction limitation.

C. A LIMITATION WHICH CONSTRAINS THE AGGRAVATOR'S REACH IS UNNECESSARY.

Adopting a limiting construction is only appropriate if the statute criminalizes a substantial amount of protected expressive activity. *U.S. v. Williams*, 553 U.S. 285, 297, 128 S.Ct. 1830, 170 L.Ed.2d 650 (2008). Rewriting a law to conform it to constitutional requirements would constitute a serious invasion of the legislative

domain. *U.S. v. Stevens*, 559 U.S. 460, 130 S.Ct. 1577, 1592. 176 L.Ed.2d 435 (2010).

In this regard the legislature sought to enhance punishment for those who engage in an ongoing pattern of psychological abuse, and only when that conduct has already violated a felony criminal statute. Prior courts have found no issue understanding the parameters of this statute: *State v. Osaldo*, 109 Wn.App. 94, 34 P.3d 258 (2001)(upholding the exceptional sentence where the defendant made seven calls where he threatened to kill); *State v. Zatkovich*, 113 Wn.App. 70, 52 P.3d 36 (2002)(upholding an exceptional sentence involving a defendants assaultive, harassing, and stalking behavior); *State v. Sweet,* 180 Wn.2d 156, 322 P.3d 1213 (2014)(upholding an aggravated sentence where the defendant's conduct was not against the same victim); *State v. Atkins*, 113 Wn.App. 661, 54 P.3d 702 (2002)(upholding the ongoing pattern of psychology abuse where the defendant struck the victim, tore her clothes off and dragged her outside in the cold and rain and locked her out and wanted the victim to prostitute herself and threatened to kill her by saying she came into the world naked and she was going to leave naked.)

Brush seeks to characterize his conduct as protected speech and asserts this statute has an "obvious chilling effect on free speech" and that without imposition of further judicial definition the phrase "psychological abuse" is "so standardless that it invites arbitrary enforcement."[7] However, Brush's conduct was anything but speech. Excluding his fiancée and her daughter from their home, damaging her vehicle with a hammer, breaking her camera, causing her to be arrested under a false claim (and attempting to do it again), repeatedly stalking her, and threatening her with criminal prosecution, financial ruin, and subjecting her to public embarrassment by posting nude photographs of her at her place of employment is not speech. This is prohibited conduct which occurred over a prolonged period of time. Even if this Court were to not consider the Oregon event, more than a month of stalking, false accusations of criminal conduct, and damaging her property demonstrates psychological abuse sufficient to sustain the trial court's verdict. As a result, this Court should not, as Brush invites, impose a limitation on this statute.

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[7] Brief of Appellant at 18-19

II. THE TRIAL COURT PROPERLY CONCLUDED BRUSH ENGAGED IN A PATTERN OF CONDUCT OVER A PROLONGED PERIOD OF TIME.

Brush asserts the trial court improperly relied upon a 2008 incident whereby Brush excluded his fiancé and her minor daughter and changed the locks on their home, as this was not "psychological abuse."[8]

Findings of fact are reviewed to determine whether they are supported by substantial evidence and, in turn, whether the findings support the conclusions of law and judgment. *State v. Macon*, 128 Wn.2d 784, 799, 911 P.2d 1004 (1996). Substantial evidence is evidence sufficient to persuade a fair minded, rational individual that the finding is true. *State v. Levy*, 156 Wn.2d 709, 733, 132 P.3d 1076 (2006). A reviewing court does not weigh the evidence or witness credibility. *Quinn v. Cherry Lane Auto Plaza, Inc.,* 153 Wn. App. 710, 717, 225 P.3d 266 (2009).

Here, Brush seeks to have excluding a single mother and her minor daughter from their residence be considered as something other than psychological abuse. This conduct followed an argument

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[8] Brief of Appellant at 26-28

and was directly related to Brush's abhorrent treatment of the victim. Brush further declares absent this 2008 conduct there was not a prolonged pattern of violence.[9] Even if the 2008 incident was not part of the on-going pattern of domestic violence, the incidents that followed from July 25, 2009 until Bonney's murder on September 11, 2009, support the trial court's determination that this was an on-going domestic violence offense which persisted for a prolonged period of time.

On July 25, 2009 Bonney and Brush had another argument where Brush became violent, bashing a chair over a couch, breaking a bottle of wine on a counter, and then going into their garage and beat her car with a hammer. PR (12/5/11) 52-53, 134-35, RP 108-111. Brush caused Bonney to be arrested with his false statements to law enforcement, perhaps because he, as a former law enforcement officer, knew how to convince the police of something. RP 111-112, 194-195. Brush then repeatedly violated their self-imposed no-contact agreement and over the course of the next two months obsessively pursued Bonney, repeatedly harassing her and sending her threatening emails. RP (12/5/11) 55, 138, 159.

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[9] Brief of Appellant at 29

For nearly two months before killing her, Brush stalked Bonney to local restaurant, friends' homes, and around two local, small Washington towns. RP 130-136, 138-139, 147, 158, 161, 167, 198-201, 211-215, 218-219, 233-235. Bonney became so terrified she resorted to switching cars because Brush was following her. RP 162. Brush filed (and threatened to file) false criminal claims which would unlawfully subject Bonney to arrest. RP 229, 235.

Finally, even Brush's counselor, Dr. Hedlund, admitted as an expert in this case, characterized Brush's actions as an ongoing pattern of domestic violence. RP 246, 248.

There was sufficient basis for the trial court to conclude, as it did, that this was an aggravated domestic violence offense marked by an ongoing pattern of abuse over a prolonged period of time.

III. THE TRIAL COURT'S SENTENCE WAS NOT CLEARLY EXCESSIVE.

Brush asserts his sentence is "clearly excessive."[10] Yet the trial court, who is the only court to personally observe the witnesses and testimony, twice found substantial and compelling reasons to justify the exceptional sentence of 1000 months.

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[10] Brief of Appellant at 30

A. Standard of review.

Review of an exceptional sentence under the Sentencing Reform Act (SRA), ch. 9.94A RCW, asks (1) are the sentencing court's reasons for an exceptional sentence supported by the record, (2) do those reasons justify a sentence outside the standard range, and (3) was the sentence clearly excessive. *State v. Kolesnik*, 146 Wn.App. 790, 192 P.3d 937 (2008). Appellate review apply a clearly erroneous standard to the first question, sentencing court's reasons; a *de novo* standard to the second, justify a sentence outside the standard range; and an abuse of discretion standard to the third, clearly excessive. *Id.* citing *State v. Law*, 154 Wn.2d 85, 93, 110 P.3d 717 (2005).

Here, Brush does not contest the fact that the record supports the sentencing court's reasons for an exceptional sentence, but instead that the sentence is clearly excessive.[11] Thus, the sentence is reviewed under an abuse of standard review. *State v. Knutz,* 161 Wn.App. 395, 410, 253 P.3d 437 (2011). An abuse of discretion occurs when a judge bases his or her decision on untenable grounds or on untenable reasons, or takes an action that no reasonable

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[11] Appellant Brief at 30

person would have taken. *Id.* When a trial judge bases an exceptional sentence on appropriate reasons, a sentence is excessive only if it "shocks the conscience." *Id.* at 410-411.

B. Brush's sentence is not clearly excessive.

The trial court, having heard the witnesses and being in the best position to understand the impact these events had on the victim, reasoned, *inter alia,* Brush's conduct "warranted no sympathy from the court" and that "he should spend the rest if his life knowing that he will never get out of prison." RP 296. As justification, the court found several instances of stalking, false accusations resulting in actual incarceration, threats of public humiliation, and on and on, which ultimately resulted in a very public, very gruesome execution of a mother of two young girls. This case was far beyond a common murder, but instead involved months, if not over a year, of increasingly terrorizing behavior until that September day when Brush loaded the shotgun in his truck, erected a shrine in his home, created a fixed handcuff position in his truck, and begged and pleaded for his victim to meet him at the beach. She went, mistakenly thinking a public place would provide safety, but when she pulled away, the last of his terror (a likely murder and suicide at his beach

home next to the shrine he created), was lost and he shot her four times, including a final, unnecessary shot to her lifeless body blowing apart her head ensuring her daughters could not have an open casket funeral and destroying the beauty that he could not possess. Indeed, this case warranted an exceptional sentence and certainly a life sentence for the former cop who thought he'd found his trophy wife, but could no longer control her and, thus, had to destroy her.

IV. COSTS SHOULD BE AWARDED.

Brush, the former owner of North River Boats, received, even while this matter was pending (according to the victim's family's attorney for the wrongful death action), a tax reimbursement in the hundreds of thousands and at the time of Brush's incarceration he had over $10,000 in his checking account. The family of the victim asserts there are hidden assets and he even proposed settlement of the criminal case upon payment to the victim's children, which they rejected. Based on this, the State believes Brush has assets and, if he prevails and is released, will likely have access to assets. As such costs should be awarded.

CONCLUSION

The aggravating factor of an ongoing pattern of psychological abuse is not vague or overbroad and the sentence based upon this

aggravator should not be disturbed. Further, the trial judge determined that based on this aggravating factor there was a substantial and compelling reason to impose an exceptional sentence. Consequently, Mr. Brush's request for relief should be denied and he should spend the balance of his life in prison unable to harm others.

Respectfully submitted this 31st day of August, 2017.

MARK MCCLAIN
PACIFIC COUNTY PROSECUTOR

By. _____
Mark McClain, WSBA#30909

PACIFIC COUNTY PROSECUTING ATTORNEY

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